COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-988

COMMONWEALTH

vs.

CHRISTOPHER E. JACKSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this consolidated appeal, the defendant, Christopher E. Jackson, appeals from his convictions after a jury trial for operating under the influence of liquor, fifth offense, and operating to endanger, and from the denial of his posttrial motion for a new trial. The complaint charged the defendant with: (1) operating a motor vehicle while under the influence of intoxicating liquor (OUI), fifth or subsequent offense, (2) operating a motor vehicle so as to endanger, (3) operating after suspension of license or revocation of right to operate (OAS), (4) operation of an unregistered motor vehicle, and (5) operation of an uninsured motor vehicle. Counts four and five are civil infractions, and were not submitted to the jury. The defendant was found not responsible on count four and count five was dismissed. In the three counts submitted to the jury, count

one was presented as a simple OUI, and count three was dismissed at the conclusion of opening statements, before the first witness was called. The jury returned guilty verdicts on the two remaining counts. Following these verdicts, the defendant elected to have a jury-waived trial on the subsequent offense portion of the OUI offense. He was convicted of a fifth OUI and sentenced thereafter. See G. L. c. 278, § 11A.

The defendant raises several claims of error. He contends the judge erred in failing to instruct the jury on cross-racial identifications and, further, that the jury were improperly alerted to his prior OUI convictions by the OAS charge which was dismissed after openings. The defendant also contends his counsel was ineffective and, therefore, the judge erred in denying his new trial motion and in not holding an evidentiary hearing. We affirm.

Discussion. 1. Jury instruction. While the judge was not precluded from instructing the jury on the dangers of cross-racial identifications, he was not required to do so. See Commonwealth v. Gomes, 470 Mass. 352, 376 (2015) (provisional jury instruction regarding cross-racial eyewitness identification not intended to have retroactive application); Commonwealth v. Bastaldo, 472 Mass. 16, 23 (2015) ("Although it was not error before Gomes for the judge to decline to give a cross-racial instruction, such an instruction must be given in

trials that commence after Gomes where there is a cross-racial identification"). The defendant nevertheless contends the judge abused his discretion in failing to provide the requested instruction here because he is a black man being identified by a white woman, and the danger of misidentification was significant. We disagree.

The eyewitness, Amy Mullin,[1] was no stranger to the defendant. She was a neighbor, who lived directly across the street from him, and had ample opportunity to observe his erratic driving. Mullin was outside her home when her attention was drawn to a vehicle traveling in reverse down the middle of her street. She immediately recognized the operator of the vehicle as her neighbor from across the street -- the defendant. Mullin observed him drive on the street, in the driveway and up onto his front lawn for approximately twenty minutes, losing sight only briefly when placing a call to the police.

Other evidence also corroborated Mullin's identification of the defendant.[2] Under these circumstances the risk of misidentification was minimal. Furthermore, the judge's instruction adequately addressed the issue of reliability in

[1] The last name of the eyewitness is referred to interchangeably throughout the record as "Mullen" or "Mullins." We refer to the eyewitness as Amy Mullin, as she spelled her name for the record during the trial.

[2] The arresting officer appeared minutes after the call, and he found the defendant slumped over the steering wheel in the driver's seat of the vehicle.

eyewitness identifications. We conclude, therefore, that the judge did not abuse his discretion in declining to instruct on the risks of cross-racial identifications. See Commonwealth v. Bly, 448 Mass. 473, 496 (2007).

2. Ineffective assistance of counsel. We review the denial of the defendant's motion for a new trial for "abuse of discretion or other error of law." Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001). We employ the familiar standard articulated in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), to assess "[w]hether there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Ibid.

The defendant faults counsel for (1) failing to move for a mistrial after the dismissal of the OAS charge, (2) failing to move to exclude portions of the police officer's testimony relating to prior visits to the defendant's home, and (3) failing to call an expert witness on the width of the street upon which he and the eyewitness lived. He bears the burden of establishing that better work might have accomplished something material for the defense. See Commonwealth v. Satterfield, 373

Mass. 109, 115 (1977); Commonwealth v. Watson, 455 Mass. 246, 256 (2009). We examine each aspect of the defendant's claim in turn.

a. Failure to move for a mistrial. The defendant claims the reference to the OAS charge, which was dismissed after the openings, improperly alerted the jury to his prior OUI convictions and, therefore, that counsel's failure to move for a mistrial deprived him of effective assistance. This claim is unavailing. Counsel cannot be faulted for failing to raise a motion that had no likelihood of success. See Commonwealth v. Comita, 441 Mass. 86, 91 (2004) (defendant must demonstrate likelihood that such motion would be successful).

Contrary to the defendant's claim, the jury's exposure to the OAS charge did not alert the jury to the defendant's record of OUI convictions. The Registrar of Motor Vehicles may suspend or revoke one's right to operate for a variety of reasons that have nothing to do with drinking and driving, including, for example, being a judgment debtor in a matter arising out of one's operation of a motor vehicle, incompetency to operate, or upon receipt of notice by the Department of Revenue of child support delinquency. See, e.g., G. L. c. 90, §§ 22, 22A. Accordingly, "this case does not present any possible extraneous influence that 'may suffice to invalidate a verdict.'" Commonwealth v. Murphy, 86 Mass. App. Ct. 118, 123 (2014)

(citation omitted). And, therefore, a motion for mistrial would have been unsuccessful.

b. Officer's testimony. We also reject the defendant's claim that counsel deprived him of effective assistance by failing to move to exclude or strike those portions of the officer's testimony that notified the jury of his previous visits to the defendant's home and his observations of "the [defendant's] vehicle [with] no license plates on it." This testimony was fleeting and not repeated in the Commonwealth's closing. As such, the defendant has made no "showing that trial counsel's performance deprived the defendant of an otherwise available substantial ground of defense, Commonwealth v. Saferian, [supra], or that better work might have accomplished something material for the defense." Commonwealth v. North, 52 Mass. App. Ct. 603, 616 (2001).

c. Failure to call expert. Last, the defendant faults counsel for failing to call an investigator to testify to the width of High Street at the point of his residence, so as to challenge the eyewitness's identification of him from across the way. Again, we see no error. "Whether to call a witness is a strategic decision." Commonwealth v. Britto, 433 Mass. 596, 602 (2001). "An attorney's tactical decision amounts to ineffective assistance of counsel only if it was manifestly unreasonable when made." Commonwealth v. Martin, 427 Mass. 816, 822 (1998),

citing Commonwealth v. Roberts, 423 Mass. 17, 20 (1996). Here, both the arresting officer and the eyewitness described High Street as having two lanes on each side of the double yellow line. This testimony dovetailed with the defendant's subsequent testimony that the distance between his front door and Mullin's front door was "[d]iagonally, about three times the distance of this courtroom." The investigator's testimony would merely have been cumulative of the other evidence adduced at trial, and was potentially less persuasive than establishing that point with the Commonwealth's own witnesses.[3] We can infer, therefore, that counsel made a rational choice to not present cumulative and less persuasive testimony.

3. Lack of evidentiary hearing on motion for new trial. We also see no merit to the defendant's assertion that the judge erred in ruling on his new trial motion without holding an evidentiary hearing. The defendant raised no substantial issue that would warrant establishing a factual record or entering

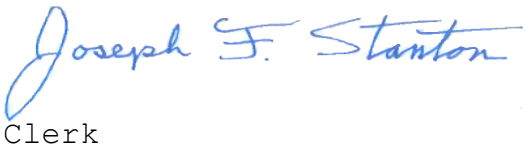
[3] The absence of an affidavit from the defendant's trial counsel outlining his strategy is telling, and the court is left only with the defendant's unsupported assertions. See Commonwealth v. Lynch, 439 Mass. 532, 539 n.2, cert. denied, 540 U.S. 1059 (2003) ("It is significant that no affidavit from trial counsel was submitted in connection with [the] motion for new trial").

further findings. See Commonwealth v. Freeman, 442 Mass. 779, 792 n.14 (2004).

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Katzmann, Grainger & Maldonado, JJ.[4]),



Clerk

Entered: January 7, 2016.

[4] The panelists are listed in order of seniority.